MAR 25 1957
JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1956

No. 856

COLUMBIA PICTURES CORPORATION,

Petitioner,

against

RICHARD STEPHENS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARTHUR H. SCHWARTZ,
Counsel for Petitioner.

LAWRENCE C. GIBBS,
STUART G. SCHWARTZ,
of Counsel.

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This is a petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit (Clark, Ch.J., Frank and Lumbard, C.JJ.), entered February 5, 1957, affirming a judgment of the United States District Court for the Southern District of New York, entered April 5, 1956, after a trial before Murphy, D. J. and a jury, awarding respondent the sum of $12,500 as compensatory damages in an action for defamation (34, 114)*.

Opinion Below

The opinion of the Court below is not yet reported. It is reproduced *infra*, at pages 21-24.

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* Unless otherwise indicated, references are to pages of appellant's appendix in the Court of Appeals.

Jurisdiction

The judgment of the Court of Appeals was entered on February 5, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

The Questions Presented

1. In an action for defamation, where jurisdiction is based solely upon diversity of citizenship and where the allegedly libelous statement is in substance a charge that the plaintiff has committed larceny, may a Court of Appeals disregard State criminal law in determining whether the defense of truth has been established?

2. In an action for defamation, where jurisdiction is based solely upon diversity of citizenship and where the allegedly libelous statement is in substance a charge that the plaintiff has committed larceny, is a Court of Appeals, in passing upon whether the defense of truth has been established, entitled to disregard decisions of the State courts holding the definition of criminal intent as set forth in the State penal law to be controlling?

The Statutes Involved

28 U. S. C. Section 1652:

> "The laws of the several states except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

New York Penal Law, Section 1290:

> "A person who, with the intent to deprive or defraud another of the use and benefit of property or to

appropriate the same to the use of the taker, or of any other person other than the true owner, wrongfully takes, obtains or withholds, by any means whatever, from the possession of the true owner or of any other person any money, personal property, thing in action, evidence of debt or contract, or articles of value of any kind, steals such property and is guilty of larceny * * *."

New York Penal Law, Section 1306:

"Upon an indictment of larceny it is a sufficient defense that the property was appropriated openly and avowedly, under a claim of title preferred in good faith, even though such claim is untenable. But this section shall not excuse the retention of the property of another, to offset or pay demands held against him."

Statement of the Case

This is an action for defamation instituted by respondent, a citizen of Massachusetts (3), against petitioner, a New York corporation (3). Federal jurisdiction is predicated upon 28 U. S. C., Section 1332(a)(1).

Respondent is a former employee of petitioner, his employment having been terminated on May 14, 1952 (7, 52-53). The allegedly defamatory matter consists of statements made by petitioner in the autumn of that year in connection with the filing of claims with the fidelity insurance company by which respondent had been bonded while in petitioner's employ. Three defamatory statements are alleged to have been made, two of them in two formal "Proofs of Loss" filed by petitioner with the insurance company (4-6, 8-10, 29-34), and the third in a preliminary letter sent by petitioner to the insurance broker who had

arranged for the insurance (13). Each of the allegedly defamatory statements is embodied in a separate cause of action.*

Each of the proofs of loss consists of a schedule of moneys with respect to which respondent was claimed to be in "default", followed by a printed form of affidavit. The schedule in the first proof of loss reads as follows (29):

> "COLUMBIA PICTURES CORPORATION presents claim for loss resulting from default under Bond No. 894555 dated 8/7/50 in the amount of $..... on behalf of Richard Stephens employed in the position of Exploiteer at Boston exchange.
>
> DETAILED STATEMENT OF CLAIM

Description of Item	Amount
Automobiles Livery Service, Inc.—Roxbury, Mass.	$ 25.00
Sheraton Plaza Hotel, Boston, Mass.	122.73
Fay Foto Service, Inc., Boston, Mass.	95.50
Waterville Morning Sentinel, Waterville, Maine	4.59
	$247.82

> In the belief that Richard Stephens had paid the above, we reimbursed him when so requested by him at the time weekly expense vouchers were submitted. After his dismissal, bills were sent to us by the above and upon investigation we learned that Richard Stephens never did make payment."

The printed form of affidavit reads as follows (30-31):

> "STATE OF NEW YORK }
> COUNTY OF NEW YORK } ss.:
>
> On this .... day of ..... 19..., before me a ..... in and for the State and

* Three additional causes of action were dismissed on respondent's consent at the close of the trial (14-20, 92-93).

County aforesaid, personally appeared .....
....., to me known, who, being duly sworn according to law, deposes and says that he is ..... of ..... (Employer) and that the above statement is true and correct in every respect and that the moneys set opposite the several items listed therein were collected by the said Employee on the dates and in the respective amounts set opposite each, and that the proceeds of same, together with the proceeds of the goods as set forth in said statement, have not been paid over or satisfied in any way whatever to the said Employer, but have been misappropriated by the said Employee with the intent to fraudulently deprive the said Employer of the same.

That where in this affidavit claim is made for Merchandise (as distinguished from cash) alleged to have been misappropriated by said Employee, said Merchandise is herein listed at the cost price of same to the Employer, i.e., exclusive of profits, etc.

That said Employee's default was discovered by Employer on or about August 1952.

Further, that there are no offsets whatever against said claim for salary, commissions, cash or other deposits except as set forth particularly on the above statement; that the said Employer has fully complied with all the conditions of the bond, issued by MARYLAND CASUALTY COMPANY of Baltimore, on behalf of the said Employee and that the said Employer has not accepted any security for or on account of same, except .....

Further, that the Employer holds *no other bond or policy of any kind covering this loss or any part thereof,* except .....

Further, the deponent saith, that the said Employee has been continuously in the employ of the said Employer for the period beginning 9/6/49 and

ending 5/15/52, the employment having been discontinued by reason of dissatisfaction.

L. J. BARBANO

Subscribed and sworn to before me, the undersigned at New York City, this 23rd day of October, 1952.

SHIRLEY WILEY,
Notary Public,
(Stamp illegible)".

The schedule in the second proof of loss reads as follows (32):

"COLUMBIA PICTURES CORPORATION presents claim for loss resulting from default under Bond No. 894555 dated ..... in the amount of $..... on behalf of Richard Stephens employed in the position of Exploiteer at Boston, Mass.

DETAILED STATEMENT OF CLAIM

Description of Item	Amount
Telephone calls during the period of March 15, 1952 through April 9, 1952 .	$43.44".

The printed form of affidavit in the second proof of loss is identical to that in the first, except as to dates and the name of the notary (33-34).

The pertinent portion of the letter to petitioner's insurance broker written in September of 1952 reads as follows (13):

"We had in our employ for about two years an exploiteer named Richard Stephens. We became dissatisfied with his work and were obliged to let him go. After we made final payment to him for his salary as well as expenses incurred while in our employ, we subsequently were informed of unpaid

bills for which we had reimbursed Richard Stephens * * *."

With respect to each of the causes of action, the following interpretation is pleaded in the complaint by way of innuendo for each of the respective allegedly defamatory statements (6, 10-11, 13):

> "That by the aforesaid publication, the defendant meant and intended to mean and it was understood by the persons to whom the said false libel was published that the plaintiff had feloniously embezzled, stolen, misappropriated and defalcated with the moneys, funds and property of the defendant * * *; that the plaintiff had committed and is guilty of the crime of stealing, embezzlement and larceny; that the plaintiff was guilty of wilful and criminal defaults; and that the plaintiff was an employee who was guilty of misconduct in his occupation, employment and profession, and that he was an irresponsible and unreliable employee and person."

In its answer petitioner pleaded two affirmative defenses, truth and privilege (22-27). In support of the defense of truth, petitioner alleged that moneys had been paid by it to respondent for certain bills set forth in expense vouchers submitted by him, and that respondent had misappropriated those moneys (22-26). In support of the defense of privilege, petitioner alleged that it was under a duty to advise the insurance company of respondent's defalcations (26-27), and that the proofs of loss and the preliminary letter were written in good faith and without malice (27).

At the trial, respondent admitted that moneys had been given to him by petitioner for bills set forth in expense vouchers submitted by him (44-47; App'ee's App. 23)* and

* References identified as "App'ee's App." are to pages of appellee's appendix in the Court of Appeals.

that he had retained the money instead of paying the bills set forth in the vouchers (44-47; App'ee's App. 13, 20-21, 38-39). He explained that some items in the voucher—for sums which he had personally expended—had been disallowed by petitioner (App'ee's App. 13-14), that he had hoped to induce petitioner to reconsider those items (App'ee's App. 16, 20-21), and that, instead of paying the approved bills set forth in the vouchers, he had "held up" the money given him for the approved expenses to await the disposition of his request for additional funds to cover his personal claim (47; App'ee's App. 39). He testified that he was still urging petitioner to reconsider its disallowance of his personal claim when he learned that the proofs of loss had been filed with the insurance company (App'ee's App. 43-44).

Under New York law, the merit or lack of merit of respondent's personal claim was immaterial insofar as the illegality of his conduct in withholding the money was concerned. By virtue of the last sentence of Section 1306 of the Penal Law (set forth *supra* at p. 3), one who misappropriates or withholds money or property is guilty of embezzlement—treated as a form of larceny by the New York Penal Law (§ 1290)—whether or not he has a good claim of offset. In this respect, the law of New York (and that of several other states having similar statutes) differs from the law of the majority of American jurisdictions (see 13 A. L. R. 142, 144).*

The District Court recognized the illegality of respondent's conduct and instructed the jury "as a matter of law" that respondent had no right to misappropriate the moneys given him on the voucher by using them as an offset against his personal claim (109). However, notwithstanding the fact that respondent's conduct constituted a crime on the

* The fact that respondent's personal claim had been stricken from the voucher precluded any claim of "title" under the first sentence of section 1306.

undisputed facts, the Court nevertheless instructed the jury that there still remained for them the issue of whether his intent had been "fraudulent", and that on that issue they could consider the testimony concerning the claimed offset (109). Petitioner's motions for a directed verdict and to set aside the verdict ultimately rendered were denied (93, 114).

On appeal, petitioner pointed out that, contrary to the District Court's ruling, the claimed offset had no bearing on whether respondent's intent was criminal. For purposes of the New York penal statute, it was sufficient to constitute criminal intent that he had intended to withhold money given to him for the purpose of paying approved expenses. Accordingly, petitioner argued that a verdict should have been directed in its favor, and that the District Court erred in submitting the case to the jury.

In affirming the judgment below, the Court of Appeals did not quarrel with the accuracy of petitioner's contentions as to the provisions of the New York Penal Law. The Court simply held the penal law to be inapposite, apparently on the theory that "fraudulent" intent for purposes of fidelity insurance is something different from "criminal" intent as defined in the Penal Law. The Court stated (*infra*, p. 23):

> "In the proofs of loss before us, on which the first two causes of action are based, Columbia charged Stephens with misappropriation 'with intent to defraud.' Regardless of whether this be considered equivalent to a charge of embezzlement or larceny, justification of the statement must include proof of an 'intent to defraud.' The existence of such intent was a question for the jury, and the provisions of § 1306 of the New York Penal Law are not controlling."

With respect to the letter constituting the basis of the third cause of action, the Court likewise relied upon respondent's contention that he had an "unpaid claim" and that "final payment had not in fact been made" (*infra*, p. 24). Refusing to take cognizance of the fact that this was immaterial under the Penal Law, the Court stated (*infra*, p. 23):

> "The jury found that it did libel Stephens, but it cannot be inferred from that finding that they found the letter contained an accusation of larceny. The most that can be said is that the letter implied a defalcation on Stephens' part. Section 1306 of the New York Penal Law pressed on us by counsel, is therefore inapposite here also."

In short, the Court of Appeals held that it was not enough for petitioner to prove that respondent had in fact been guilty of criminally embezzling the moneys in question. The Court held, in effect, that even assuming that respondent was proved to be guilty of the crime imputed by the allegedly defamatory statements, nevertheless the defense of truth would not be regarded as having been established unless petitioner also proved additional facts which had no bearing upon the criminality of respondent's conduct under State law.

Reasons for Granting the Writ

Review is sought pursuant to the second clause of Rule 19(1)(b) of the Rules of this Court, in which it is provided that issuance of a writ of certiorari to a Court of Appeals may be deemed appropriate under the following circumstances:

> "Where a court of appeals * * * has decided an important state or territorial question in a way in conflict with applicable state or territorial law."

In the present case, insofar as it holds that there is a difference between "fraudulent" intent for purposes of fidelity insurance and "criminal" intent for purposes of the Penal Law, the decision of the Court of Appeals is in conflict with the law of New York as expressed in the following State Court decisions:

Graves v. *Kaltenbach & Stephens, Inc.* (1st Dept. 1923) 205 App. Div. 110, aff'd on other grounds 237 N. Y. 546;

Greene v. *Fankhauser* (1st Dept. 1910) 137 App. Div. 124;

J. W. Matthews & Co. v. *Employers' Liability Assurance Co.* (2d Dept. 1908) 127 App. Div. 195, aff'd 195 N. Y. 593;

Burlingame v. *Sun Printing & Publishing Assoc.* (2d Dept. 1936) 247 App. Div. 894.

The question is important because it affects the interpretation of thousands of fidelity insurance policies which are currently in effect in New York. The proof of loss filed in the present case is the standard form used by all insurance companies which are members of the Surety Association of America, which include virtually all stock companies engaged in the business. In 1955, the total premiums collected on fidelity and surety policies in New York State aggregated more than $26,000,000,* which constituted more than a third of all such premiums collected in the United States.**

Up to the present time, it has always been assumed that the existence of the fraudulent intent referred to in these policies is sufficiently established by proving criminal intent as defined in the Penal Law. The holding of the Court of Appeals in the present case upsets this firmly established principle and seriously impairs the scope of the protection afforded by such policies.

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* N. Y. Ins. Dept. Advance Printing of Principal Statistics, Bus. of 1955, pp. 7 AS, 7 NS.

** Best's 1956 Aggregates and Averages, pp. 132, 196.

Argument

The State Court decisions set forth above establish the following propositions: (1) *Graves* v. *Kaltenbach & Stephens, Inc., supra,* 205 App. Div. 110, aff'd on other grounds 237 N. Y. 546, and *Greene* v. *Fankhauser, supra,* 137 App. Div. 124, establish that respondent's admitted intent was criminal as a matter of law under the New York larceny statute; (2) *J. W. Matthews & Co.* v. *Employers' Liability Assurance Co., supra,* 127 App. Div. 195, aff'd 195 N. Y. 593, and *Burlingame* v. *Sun Printing & Publishing Assoc., supra,* 247 App. Div. 894, establish that the words "fraudulent intent" as used in fidelity policies are to be interpreted in accordance with the meaning of criminal intent under the larceny statute.

POINT I

Respondent's intent was criminal as a matter of law.

Graves v. *Kaltenbach & Stephens, Inc., supra,* 205 App. Div. 110, aff'd on other grounds 237 N. Y. 546, was an action for wrongful discharge in which the justification pleaded by the defendant for the discharge was that plaintiff had committed larceny by applying to his own use money entrusted to him to be paid over to a third party. The plaintiff testified that he had an offsetting claim for disbursements. The case was submitted to the jury on the issue, *inter alia,* of plaintiff's criminal intent. Holding that a verdict should have been directed for the defendant, the Court stated (at p. 111):

> "It was admitted, not alone by failure to reply to the counterclaim but specifically upon the trial, that he had never paid this money over but had retained and converted it to his own use. His only

> justification was that as he had the money in his possession when he was discharged he credited the amount on his claims for damages for wrongful discharge and for certain disbursements that he alleged he had made for the defendant's account. Thus the plaintiff admits that he took property of the defendant under such circumstances as amounted to a larceny (Penal Law, § 1290, subd. 2) and for which his alleged justification was not an excuse. (Id. § 1306). This act was a complete justification for the discharge * * *. The facts being admitted, the question of justification was for the court and the case should not have been submitted to the jury."

The difference between a general claim of offset, as referred to in the second sentence of Section 1306, and a specific claim of title, as referred to in the first sentence thereof, was explained in *Greene* v. *Fankhauser, supra,* 137 App. Div. 124, which was an action for false imprisonment in which the defendant had caused the plaintiff's arrest on a charge of larceny. The facts were that the plaintiff was a garage operator who had seized possession of an automobile owned by the defendant and had refused to surrender it unless the defendant paid an outstanding bill. Despite the fact that the plaintiff's motive had been to enforce payment of an outstanding bill, the Court held that he had the requisite criminal intent to support a charge of larceny and was therefore unable to maintain an action for false arrest. The Court pointed out that, while he might have had a general claim against the defendant, he did not have any specific claim of title against the property which he had appropriated, saying (at p. 133):

> "It may well be that if the plaintiff had the lawful possession of the automobile, and erroneously but in good faith asserted ownership or a lien *thereon,* the provisions of this section relieve him of the

> charge of larceny in detaining the property; *but he asserted no lien* • • • " (emphasis supplied).

The Court held that, absent a specific claim of title, the fact that he had intended to deprive another of his property was enough to constitute criminal intent under the New York statute (at p. 132):

> "[W]e are of the opinion that the criminal intent is the intent to deprive the owner of his property in taking it from the street *or in detaining it* in the garage. That is the material fact with respect to the intent that constitutes the crime • • •. Of course, it is well settled that there must be criminal intent in order to constitute a crime, but the criminal intent is the doing of the act prohibited with the intent *specified in the statute.*" (Emphasis supplied.)

In the present case, as in *Graves* and *Greene*, it was clear from respondent's own testimony that he had no claim against the specific funds which he misappropriated. Respondent acknowledged that the moneys entrusted to him had not been allowed on his personal claim, his contention being merely that he conducted discussions with petitioner's representatives as to whether or not petitioner would give him *additional* funds to satisfy that claim (47; App'ee's App. 13-19, 20-21, 38-39). In short, as in the *Graves* and *Greene* cases, respondent's personal claim was at best an offset and, this being so, his intent by his own testimony was criminal within the meaning of the larceny statute, and he was guilty as a matter of State law of the crime defined thereby.

POINT II

Under New York law, the words "fraudulent intent" as used in fidelity insurance policies must be construed in accordance with the meaning of criminal intent as defined in the Penal Law.

As already stated, the impropriety of respondent's conduct was recognized by the District Court when it charged the jury as a matter of law that respondent had no right to misappropriate the moneys that had been entrusted to him by using them to satisfy his personal claim. Nevertheless, the Court of Appeals held that the District Court was justified in submitting the case to the jury on the issue of fraudulent intent, apparently on the theory that fraudulent intent as used in the insurance policy was something different from criminal intent as defined by the Penal Law. This holding of the Court of Appeals was directly contrary to the decision in *J. W. Matthews & Co.* v. *Employers Liability Assurance Co., supra,* 127 App. Div. 195, aff'd 195 N. Y. 593, the third of the State Court decisions cited above, in which it was squarely held that the words "fraudulent intent" as used in fidelity insurance policies are to be interpreted in accordance with the meaning of criminal intent under Section 1306 of the Penal Law.

The *Matthews* case was an action brought by the insured to recover under a fidelity insurance policy which, like the policy in the present case, purported to provide protection against defalcations made with fraudulent intent. In that case, the defalcating employee was a salesman who, before remitting the proceeds of his collections, deducted a portion thereof which he applied against claimed arrears in salary and expenses. Contesting its liability under the policy, the insurance company argued that in view of these claimed offsets the salesman could not be regarded as having been motivated by a "fraudulent intent". The Court, however,

held that the words "fraudulent intent" had to be interpreted in accordance with Section 1306 of the Penal Law, and pointed out that under that section his intent would be regarded as criminal notwithstanding the claimed offsets (at pp. 196-197):

> "Section 548 [predecessor of Penal Law § 1306] provides that it is a sufficient defense that the 'property' was 'appropriated openly and avowedly under a claim of title preferred in good faith, even though such claim is untenable * * *.' The money was not appropriated under a claim of title, but under a claim of indebtedness by the plaintiff to the agent; and it is provided by the last sentence of this same section that the said section 'shall not excuse the retention of the property of another to offset or pay demands held against him'."

It may be noted that an alternative ground for decision in the *Matthews* case was that the factual issue of good faith had been resolved against the salesman. However, the holding with regard to the immateriality of the claim of offset was made entirely independently of that factual issue. Moreover, even in adverting to the factual question of good faith, the Court assumed that the insurance policy would be construed in accordance with the provisions of the Penal Law (at p. 197).

The courts of New York have refused to depart from the foregoing principles in defining the essential elements of the defense of truth in actions for defamation where the gravamen of the defamatory statement complained of is a charge of misappropriation. In *Burlingame* v. *Sun Printing and Publishing Association, supra,* 247 App. Div. 894, where the allegedly defamatory publication had stated that plaintiff's excuse for his defalcations was an offsetting claim for salary, the defendant's plea of truth alleged only that the charge of misappropriation was true and

made no reference to the fact that the pretext had been a claim for salary.

Based upon this failure to make any allegation with respect to his purpose, plaintiff moved to strike the defense for legal insufficiency on the ground that the plea of truth was not as broad as the charge. Refusing to grant such relief, the Court held that, even though the alleged defamatory publication had included a statement concerning plaintiff's purpose, the accusation of misappropriation was the gravamen of the charge, and the purpose was immaterial (at p. 894):

> "We are further of the opinion that, so far as the amended answer alleges that plaintiff took large sums of money from the corporation without legal authorization, it alleges a justification as broad as the charge and constitutes a sufficient defense • • •. The gravamen of the charge is the misappropriation or conversion of corporate funds, and plaintiff's purpose in such misappropriation adds nothing to that charge and is not material thereto. The justification is, therefore, sufficient without alleging the truth of that purpose as stated in the article complained of."

In the present case also, once the fact that plaintiff had committed a crime was established, his purpose was immaterial. If plaintiff was a thief on the admitted facts, there was no material issue for submission to the jury.

The sole State Court decision cited in the opinion of the Court of Appeals in the present case is *Fleckenstein* v. *Friedman* (1934) 266 N. Y. 19. This case merely stands for the axiomatic proposition that proof of the truth of a defamatory statement must generally be as broad as the charge. However, that decision in no way casts any doubt upon the specific rule established by the *Matthews*

case, *supra*, that the words "fraudulent intent" as used in fidelity insurance policies are to be interpreted in accordance with the meaning of criminal intent under the Penal Law. Moreover, the subsequent decision in the *Burlingame* case, *supra*, expressly held that the general rule does not require proof of purpose where the gravamen of the alleged defamatory statement is a charge of misappropriation.

It is significant that the reasoning of the Court of Appeals in the present case is inconsistent with its own recent opinion in *De Ronde* v. *Gaytime Shops, Inc.* (2nd Cir. 1956) 239 F. 2d 735. The *De Ronde* case, also a defamation action, was based upon statements made in a proof of loss identical in form to those involved in the present case. In that case, the misappropriation had taken place in Pennsylvania, where the penal definition of criminal intent is narrower than that in New York in that, unlike New York, the existence of offsetting claims is recognized as a defense to larceny. See *Commonwealth* v. *Wiener* (1941) 340 Pa. 369. In *De Ronde*, adopting an approach entirely inconsistent with the approach taken in the instant case, the Court approved the District Court's submission of the question of "criminal" intent to the jury (at p. 738):

> "The charge contained in the proof of loss embraced the crime of embezzlement, and under the law of Pennsylvania, where the act occurred, embezzlement requires a *criminal* intent. *Commonwealth* v. *Irvine*, 125 Pa. Super. Ct. 606 (1937). The existence or non-existence of such a *criminal* intent was, in this case, a question of fact for the jury." (Emphasis supplied.)

In contrast with the *De Ronde* opinion, the Court of Appeals' holding in the present case, that petitioner was required to prove more than respondent's guilt of the imputed crime, is unprecedented. It is true that Courts

in other jurisdictions have occasionally held that the defense of truth may be established by proof of something *less* than the criminal charge, *i.e.* without proof even of criminal intent. See, *e.g. Buckeye Cotton Oil Co.* v. *Sloane* (6th Cir. 1921) 272 Fed. 615, 623. However, the present decision constitutes the only case in any jurisdiction that the writer has been able to discover in which proof of something *more* than the imputed crime was required in order to establish the defense of truth.

In short, fidelity insurance policies of the type involved in the present case are designed to protect the insured against embezzlement. In the present case, petitioner filed a proof of loss based upon respondent's guilt of that crime. At the trial, petitioner proved that its charges were true and that respondent was, in fact, guilty of the alleged crime. The Court of Appeals, however, relying upon a literal reading of the policy in a fashion contrary to the interpretation decreed by New York State decisional law, held that petitioner was required to prove something more than the commission of the crime.

This holding of the Court of Appeals will have serious consequences upon the vested rights of thousands of employers holding fidelity insurance policies drawn in accordance with the same standard form. If the decision of the Court of Appeals had been rendered by an intermediate State Appellate Court, recourse could have been had to the highest Court of the State, but since it was a Federal tribunal, no such recourse is available. It is respectfully submitted that under Rule 19(1)(b) of the Rules of this Court, this Court is the proper tribunal to correct the clear error of the Court of Appeals, which will otherwise have a serious effect upon the thousands of policy holders of fidelity insurance in the State of New York.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

(Opinion of the Court of Appeals)

Before:

CLARK, *Chief Judge*,
FRANK and LUMBARD, *Circuit Judges.**

LUMBARD, *Circuit Judge*:

Columbia Pictures Corporation, a New York corporation, sued for defamation by Richard Stephens, a Massachusetts citizen, appeals from a judgment against it for $12,500 on the verdict of a jury.

Stephens, an employee of Columbia, working at its Boston, Mass. office, was authorized to make disbursements for Columbia and to put them on a weekly expense account. These expenses were customarily reimbursed to Stephens in a lump sum. Stephens was also authorized to bill certain expenses, charge them to the expense account, and pay the bills out of the expense reimbursement check he received from Columbia.

On May 14, 1952 Stephens either resigned or was discharged by Columbia. At that time, four bills totalling $247.82 which Stephens had incurred for Columbia, remained unpaid. He had received from Columbia the money to pay these bills, but did not pay them; instead he retained the money as an offset against a claim of over $400 against Columbia for other unpaid disbursements he had made.

Columbia subsequently, through its treasurer, Louis J. Barbano, filed with the Maryland Casualty Company, its insurance carrier, two sworn proofs of loss which stated that Stephens had "misappropriated" the funds "with the intent to fraudulently deprive the said Employer of same"; the proofs of loss also recited that "there are no offsets

* Judge Frank died after voting for affirmance but before expressing his views with respect to this opinion. (Footnote by the Court.)

whatever against such claim." Floyd Weber, the defendant's insurance manager, also wrote a letter containing much the same allegations to the insurance brokerage firm which handled Columbia's policy. This action involves three causes of action; one based on this letter and the other two based on the two proofs of loss.

The appellant, Columbia, now contends that the judgment should be reversed on several grounds:

1. That the defense of truth was established, with nothing left for the jury to decide, when plaintiff admitted keeping the money, since plaintiff's good faith, in retaining it as an offset, is irrelevant under New York Penal Law § 1306 which provides:

> "Upon an indictment for larceny it is a sufficient defense that the property was appropriated openly and avowedly, under a claim of title preferred in good faith, even though such claim is untenable. But this section shall not excuse the retention of the property of another, to offset or pay demands held against him."

The defendant relies on the last sentence of this section, arguing that once Stephens had admitted taking the money, his claim of offset should not be considered, criminal intent being implied as a matter of law and no issue being left for the jury.

2. That the defense of qualified privilege was sustained as a matter of law since no actual malice or ill will was shown; nor was Barbano guilty of such reckless disregard of the plaintiff's rights as would amount to malice, since in signing the proofs of loss he acted solely in a ministerial capacity; and

3. That the trial judge erred in admitting evidence over objection, to show ill will towards Stephens on the part of

McWilliams, his immediate supervisor at Columbia, since McWilliams could not be considered as vice-principal in the libel.

We find no merit in any of these contentions. To establish the defense of truth in an action for libel the facts proved in justification must substantiate all of the defamatory matter charged. *Fleckenstein* v. *Friedman*, 266 N. Y. 19, 23 (1934). In the proofs of loss before us, on which the first two causes of action are based, Columbia charged Stephens with misappropriation "with intent to defraud." Regardless of whether this be considered equivalent to a charge of embezzlement or larceny, justification of the statement must include proof of an "intent to defraud." The existence of such intent was a question for the jury, and the provisions of § 1306 of the New York Penal Law are not controlling.

We come now to Columbia's letter to its insurance broker, on which the third cause of action is based. The letter, in part, reads:

> "We had in our employ for about two years an exploiteer named Richard Stephens. We became dissatisfied with his work and were obliged to let him go. After we made final payment to him for his salary as well as expenses incurred while in our employ, we subsequently were informed of unpaid bills for which we had reimbursed Richard Stephens * * *"

Judge Murphy found that the letter was not libelous *per se* and left to the jury the question of whether it held Stephens up to "public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace." The jury found that it did libel Stephens, but it cannot be inferred from that finding that they found the letter contained an accusation of larceny. The most that can be said is that the letter implied a defalcation on Stephens' part. Section 1306 of the New York Penal Law, pressed on us by counsel, is therefore inapposite here also.

Nor was the defense of truth established as to this cause of action either. As noted above, to sustain the defense of truth, New York law requires that the facts proven be as broad as the charge. Here the libelous implication rests at least in part on the allegation contained in the letter that final payment had been made to Stephens " * * * for his salary as well as expenses incurred * * * " There was, however, evidence to support a finding that Stephens had an unpaid claim against Columbia and that final payment had not in fact been made. Whether the defendant had sustained the defense of truth was a question for the jury, and the jury's finding that Columbia had failed in this defense is clearly supported by the evidence.

There is no merit in the appellant's other contentions. Columbia argues that its qualified privilege could be lost only by a showing of actual malice or ill will. Under the law of the State of New York, which governs because the publication took place in New York, the malice which would destroy a qualified privilege is not limited to personal ill will. It may also consist of a wanton and reckless disregard of the rights of another. Cf. *Murray De Ronde* v. *Gaytime Shops,* — F. 2d — (2 Cir. decided December 7, 1956) and the cases cited therein. The jury's finding of such recklessness is here supported by the evidence. It may be true that both Barbano and Weber were acting in only a ministerial capacity, but in so doing they relied on information obtained from McWilliams, plaintiff's immediate superior. These officers knew of McWilliams' marked personal animosity to Stephens and despite that they accepted McWilliams' statements without investigation. This evidence was sufficient to sustain a finding of reckless disregard of the plaintiff's rights. Of course evidence of McWilliams' animus against Stephens and the fact that it was known to Barbano and Weber were pertinent and clearly admissible.

Affirmed.

(Judgment of Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of February one thousand nine hundred and fifty-seven.

Present:

HON. CHARLES E. CLARK,
Chief Judge,
HON. JEROME N. FRANK,
HON. J. EDWARD LUMBARD,
Circuit Judges.

RICHARD STEPHENS,
Plaintiff-Appellee,

v.

COLUMBIA PICTURES CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO,
Clerk.